(1)

90-1084

Supreme Court, U.S.
FILED
JAN 4 1991
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

JOSEPH A. MAYERCHECK
Petitioner

v.

SUPREME COURT OF PENNSYLVANIA,
THE HONORABLE W. TERRENCE O'BRIEN,
THE HONORABLE R. STANTON WETTICK,
THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY,
THE HONORABLE LAWRENCE KAPLAN,
and THE HONORABLE DAVID CASHMAN,
Defendants.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Joseph A. Mayercheck, Pro se
208 Spring Run Drive
Monroeville, PA. 15146
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Younger abstention doctrine applies when the State Court has defied the due process requirements of the 14th Amendment to the United States Constitution and all state procedural rules by arbitrarily removing an eight year old child from the custody of one parent and then deliberately obstructing that parent's right to a hearing on the merits for in excess of three years and the judge has expressed a personal disdain for the rights of that parent?

2. Whether the Federal Court should intervene when it is clearly demonstrated that the state's interference with the parent-child relationship is more harmful to the child than the harm the court is alleged to be protecting the child from and the state court is not protecting a legitimate state interest?

3. What constitutes "ongoing" in a State Court when there has been no hearing on the merits for over three years?

LIST OF PARTIES

1. Pennsylvania Supreme Court
2. Honorable W. Terrence O'Brien
3. Honorable R. Stanton Wettick
4. Court of Common Pleas of Allegheny County, Pennsylvania
5. Honorable Lawrence Kaplan
6. Honorable David Cashman

All the above parties have been represented by A. Taylor Williams, Esquire, from the Court's Administrative Office in Philadelphia.

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REPORTS AND OPINIONS BY THE COURT BELOW

1. Order by United States Court of Appeals for the Third Circuit affirming the Order of the district court to abstain dated October 29, 1990. Appendix A.

2. Order by the United States Court of Appeals for the Third Circuit denying the Petition for Rehearing dated November 14, 1990. Appendix B.

3. Not for Publication Memorandum Opinion by the United States Court of Appeals for the Third Circuit affirming a previous district court abstention dated May 18, 1989. Appendix C.

4. Opinion and Order of the District Court dismissing the present complaint dated May 10, 1990. Apppendix D.

5. Report of the Court Appointed Psychologist dated July 17, 1987. Appendix E.

6. Mental evaluation report of Joseph A. Mayercheck by Dr. Paul Holland dated October 27, 1988. Appendix F.

JURISDICTION

The United States Court of Appeals for the Third Circuit issued an Order in this matter and was filed October 29, 1990 (App. A). A timely Petition for Rehearing was filed on November 1, 1990.

The Third Circuit Court of Appeal's denial of the Petition for Rehearing was issued on November 14, 1990 (App. B). This Court's jurisdiction is invoked under Title 28, U.S.C. #1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Amendments, I, V, XIV

42 U.S.C. 1983
42 U.S.C. 1985
42 U.S.C. 1986
42 U.S.C. 1988
Pennsylvania Constitution Art. 1, #26.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On November 15, 1988, Joseph A. Mayercheck filed a civil action, pro se, in the United States District Court for the Western District of Pennsylvania against four state court judges, a court-appointed psychologist, his former wife and in-laws, alleging violations of 42 U.S.C. ##1983, 1985 and 1986, seeking injunctive relief, damages and attorney fees. Jurisdiction was invoked by 28 U.S.C. 1331, 1332 and 1343. They had involuntarily terminated his parental rights after eight years without evidence or due process of any kind. Only a motion's pleading by his ex-spouse alleging "harassment" was considered sufficient.

On December 2, 1988, a federal magistrate, sua sponte, reported and recommended, to the district court judge,

that the action be dismissed, applying the federal doctrine of abstention in state court custody proceeding. The magistrate cited the doctrine of Younger v. Harris, 401 U.S. 37 (1971) holding that the "interests of comity and federalism counsel federal courts to abstain jurisdiction whenever federal claims have or could be presented in ongoing state judicial proceedings that concern important state interests", analogizing this case to Moore v. Sims, 442 U.S. 415 (1979). The District Court, without further opinion, dismissed the complaint, on December 12, 1988.

Joseph A. Mayercheck appealed, the portion of the decision of the district court abstaining from granting prospective relief against state court judges, to the United States Court of Appeals for the Third Circuit.

On May 18, 1989, a three judge panel, of

the United States Court of Appeals for the Third Circuit, affirmed the district court decision (App. C). The court of appeals, without addressing the issue of prospective relief against state court judges, found that "although the Common Pleas Court [Pennsylvania state court] has entered a final order, it retains jurisdiction over the custody case and may modify the order at any time the circumstances warrant. Thus, the state proceedings are ongoing 23 PA. C.S.A. Sec. 5310." (App. C. pg. 2)

The Third Circuit Court of Appeals emphasized that "it is will established that judges are immune form liability for damages for judicial matters within the judges subject matter jurisdiction. This immunity applies regardless of whether the judge's action is in error, performed with malice or is in excess of the judge's authority, Stump v. Sparkman, 435 U.S. 349 (1978), or is

performed as a result of a conspiracy with others, Dennis v. Sparks, 449 U.S. 24 (1980). The allegations in the complaint with respect to the judges concern judicial acts taking (sic) as judges of the Family Division, the Pennsylvania Court of Common Pleas in a subject over which the judges had jurisdiction. See 42 PA. C.S.A. Sec. 931, Pennsylvania Constitution Art. V. (App. C, pg. 3).

Mayercheck petitioned the United States Court of APpeals for the Third Circuit for a rehearing, pursuant to Rule 40 of the Federal Rules of Civil Procedure. In his petition, Mayercheck asserted that the issue before the court was his fundamental right to due process in the state court and not the underlying issue of custody.

An Amicus Brief was filed by F.A.I.R. (Fathers Advocacy Information and Referral). That Brief stated that the District Court

errored in applying the Younger Doctrine. Younger abstention is available only where the lower court litigation is both criminal and ongoing. The Mayercheck case certainly wasn't "ongoing" since at the time, nothing was done to re-unite father and daughter for over a year while the state refused to have any hearings on the merits.

F.A.I.R. also stated that the District Court should have had an evidentiary hearing in order to weigh the respective rights of the state interest in the best interest of the child against the fundamental Constitutional interests of the father.

Mayercheck reiterated that this case involves "the taking of a young child from her father, by the state court, without due process of law, and for no legitimate reason." He had been denied access to the state court, for more than one year. The

federal issue is whether the procedures employed, in terminating Mayercheck's rights with his daughter, violated the constitution. Mayercheck asked the Court of Appeals to invoke equitable relief because Appellant had no other adequate remedy at law and would suffer irreparable injury if denied equitable relief.

On June 27, 1989, the United State Court of Appeals for the Third Circuit affirmed the panel decision, denying equitable relief.

During the federal appeal process, the State Courts continued to deny Mayercheck all due process rights since the Judges knew they had immunity already granted by the Third Circuit.

In March, 1989, Mayercheck filed an Application for Extraordinary Relief with the Pennsylvania Supreme Court. During the entire year 1989, the State Courts made no

reasonable attempt to reunite father and daughter.

On January 4, 1990, Mayercheck filed another federal lawsuit against the State. Alleging that even though no relief was previously granted, by doing nothing for the entire year an action to prevent neglect was warranted, U.S.C. 42, #1986 as well as 1983, 1985 and injunctive relief. Jurisdiction was again conferred by 28 U.S.C. #1331, 1332 and 1343. The Supreme Court of Pennsylvania was now additionally named as a party.

On January 25, 1990, the Pennsylvania Supreme Court granted Mayercheck's Application for Extraordinary Relief but no decision has ever been rendered.

On May 10, 1990, the District Court once again denied Mayercheck any relief and used the same reasons for abstention as in the initial Civil Rights case. (App. D)

Mayercheck again appealed to the Third Circuit Appeals Court with that court just affirming the District Court's abstention on October 29, 1990 (App. A). A Petition for Rehearing was filed and that too was denied by the Third Circuit on November 14, 1990 (App. B), thus creating the instant petition to the United States Supreme Court

B. STATEMENT OF THE FACTS

Dr. Mayercheck and Ellen Woods were married for one year and the natural parents of Amanda. 3 months after the child's birth, Woods deserted the marriage and refused Mayercheck any access to his child. Woods alleged both sexual and physical abuse of the 3 month old baby. After much testimony, the Pennsylvania State Courts on January 13, 1982, awarded Mayercheck partial custody from Thursdays to Sundays, the month of August, and holidays. Woods appealed but the Pennsylvania Superior Court affirmed the award.

From 1982 to 1987, Mayercheck enjoyed a strong and loving relationship with his daughter. He also had remarried, and adopted two sons. Amanda became bonded to her new mother and brothers. In 1987, Mayercheck consulted the previous court appointed psychologist to increase his custody time. A report was made recommending joint custody stating that, "Amanda loves each of you and is presently comfortable in both of her homes. I feel that some form of joint custody is the best solution for Amanda and your families." (App. D).

Mayercheck received no support from Woods on a voluntary agreement so he filed for a modification of custody in November, 1987. On December 17, 1987, Woods obstructed the well-established custody rights of Mayercheck and on December 18, 1987, filed a petition to suspend all

custody rights of Mayercheck alleging "harassment" for six years. This contradicted the report by the court appointed psychologist only a few months earlier.

However on December 18, 1987, Judge Lawrence Kaplan granted the petition to suspend even though there had never been any evidence that Mayercheck has ever abused or threatened the welfare of the child. There was no hearing nor did Woods ever utter one word of testimony under oath to satisfy her burden of proof as the moving party.

Mayercheck made repeated and diligent attempts in the state courts through Judge W. Terrence O'Brien to rebut the allegations made by Woods with the State Court denying all requests. All orders were labeled "Temporary". Even when some visitation was recommended by a court-appointed therapist,

Woods would obstruct with the state courts refusing to sanction her action.

Finally on August 22, 1988, Woods used another motions pleading to again terminate even the recommended visitation rights. In an ex-parte order, Judge David Cashman suspended all visitation and referred the case back to Judge W. Terrence O'Brien. Judge O'Brien confirmed the termination of parental rights and ordered Mayercheck to therapy even though there was no indication or evidence that therapy was needed.

Mayercheck complied with all the Court's requests (App. E) but the personal animosities Judge W. Terrence O'Brien had for Mayercheck could not be overcome.

THERE HAS NOT BEEN A DUE PROCESS HEARING IN THE STATE COURTS FOR OVER 3 YEARS AND MAYERCHECK HAS NOT SEEN HIS DAUGHTER FOR OVER 850 DAYS !

REASONS FOR GRANTING THE WRIT

A. The Doctrine of Younger v. Harris for abstention has been misapplied.

In Younger v Harris, 401 U.S.37, 27 L. Ed.2d 669, 91 S.Ct. 46 (1971), the court held that the federal courts should abstain where the district court finds that the state court proceeding is not motivated by a desire to harass or act in bad faith.

Petitioner alleges that his daughter was removed from his custody in bad faith. The child's mother made allegations that Petitioner harassed the child in an "emergency petition", asking the court to take Petitioner's rights away. There was no evidentiary hearing or testimony presented. The state court removed the child from any contact with Petitioner. It has been more that three years and Petitioner has never been given a trial

on the merits or the opportunity to refute of disprove the allegations made by the child's mother, despite repeated requests. For more than three years, the state court has ignored every request for a hearing on the merits. Petitioner challenges the right of the state court to arbitrarily interfere with his rights and with his daughters. He alleged that the state court proceedings have been obstructed by state court judges.

In March 1989, Petitioner filed a Petition for Extraordinary Relief to the Supreme Court of Pennsylvania. The state's highest court has failed to act on that petition.

The Younger abstention doctrine does not apply when the state court has defied the due process requirements of the 14th Amendment to the United States

Constitution and all state procedural rules as well as much evidence exists showing bad faith and harassment by the State.

B. **What constitutes "ongoing"?**

Although there is no basis for such a finding, the federal district court has, on several occasions, abstained on the basis that the state's actions in completely severing petitioner's relationship with his daughter is "ongoing". See e.g. Moore v. Sims, 442 U.S. 415 (1979).

Petitioner has been denied access to the state courts and has exhausted every state remedy to get an evidentiary hearing for over 3 years. The person who caused his custody to be terminated has yet to speak a work under oath to support her allegations against your petitioner. Ironically, there are no

similarities in Petitioner's case with the Sims case. The Sims children were abused. The "temporary" order had an expiration date, there was a hearing, and the children were returned. The Mayercheck child was not abused, the "temporary" orders have gone on for over 3 years, there has never been a hearing and its been over 850 days since petitioner saw his daughter.

Although Petitioner never asked the federal court to decide the underlying issue of custody, the federal court "abstained" because the state court "retains jurisdiction over the custody case and may modify the order at any time the circumstances warrant', thus satisfying the criteria that the state proceedings implicate important state interest. There have been cases where the federal courts took jurisdiction

even while there was pending state actions, see e.g. Los Angeles NAACP v. Los Angeles Unified School District, 518 F. Supp. 1053 and reversed at 714 F2 946, Reynolds v. City of Dayton, 533 F. Supp 136 (1982), and Silvers v. Woolf, 538 F. Supp 881 affirmed at 694 F2 8 (1982).

It clearly appears that the federal courts have been shielding the state court's gross intrusions upon an individual's rights, not out of deference to comity and the old federalism, but in order to allow the state court to continue to abuse and violate an individual's Constitutional and Statutory rights. The practical message of the federal court decision is to send an alarming message to the citizens of this country; Constitutional rights are optional to the states.

Citizens have no practical protection from state court judges who abuse their offices by acting in bad faith, with malice, or in conspiracy to violate the individual's Constitutional and Statutory rights. (see App. C).
The concept that "justice delayed is justice denied" should apply to this case. In Monroe v. Pape, 365 U.S. 167 (1961), the court held that the federal remedy is supplementary to the state remedy, and the latter need not be sought and refused before the federal one is invoked, Id at 183. The deprivations of Petitioner's rights are substantive violations of his Constitutional liberties, which clearly are not embraced by the adequate state remedy rule. The state court case is ongoing only in the sense that all domestic cases are ongoing until the

child reaches majority.

C. **The State has no legitimate interest disrupting the family unit, without showing unfitness, for over three years using "temporary" orders.**

In Santosky v. Kramer, 102 S.Ct. 1388 (1982), the United States Supreme Court addressed the standard of proof required in a parental rights termination proceeding. States were required to safeguard the profound liberty interest at stake, by meeting a clear and convincing level of proof. The risk of an erroneous termination was found to be too high, when parents face the irreversible loss of their natural children.

Santosky v. Kramer, supra, found the interest of the parents, in their relationship with their children, to be sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.

States are required to demonstrate that the parents are unfit, because it has no legitimate interest in disrupting the integrity of the family unit. Id. at 1398. The evidentiary standard must afford fundamental due process protections. Id. at 1394.

The State's only legitimate interest, in child custody cases, is to protect children who cannot care for themselves. When the state proceedings threaten to terminate the natural parent's protected liberty interest in the right to care for and nurture their children, due process dictates that the state afford a parent every reasonable opportunity to maintain that parental relationship. In this case, the state court's intrusion upon that parental relationship was an arbitrary, unconstitutional intrusion upon the integrity of the

family unit where the state has no legitimate interest in disrupting the family unit. There is no evidence that Joseph A. Mayercheck is an unfit parent. This case demonstrates the unethical devices that one parent may employ, against another unsuspecting parent, in order to gain the upper hand in a child custody dispute. It is a national problem when State courts do not fully recognize each parent's individual due process rights.

An unscrupulous parent presents "emergency" allegations and the court, anxious to expedite this perceived problem, enters a "temporary" order, without any evidentiary showing. The unsuspecting parent becomes the victim of a system which perpetuates dishonesty and trickery. The problem is only exacerbated when these "temporary"

orders have a permanent effect. A parent becomes the victim of a prejudiced system, resulting in the "unnecessary destruction of their natural family". See Santosky v. Kramer, supra at 1401.

D. **What are the possible motives of the Federal courts for abstaining?**

When Petitioner filed both his federal lawsuits alleging civil rights violations, on both complaints he asked for damages as well as legal fees and injunctive relief. At least seven Circuits have indicated affirmatively that there is no immunity bar to such relief, and in situation where in their judgment an injunction against a judicial officer was necessary to prevent irreparable injury to a petitioner's constitutional rights, courts have granted that relief; Pulliam v. Allen, 104 S.Ct. 1970 (1984). The

Third Circuit apparently feels that abstention is the remedy for serious civil rights violations.

However, could it be that the real issue that all courts try to dodge is that of judicial immunity? If relief would have been granted by the Federal courts, an award of legal fees via U.S.C. 42, #1988 would have been appropriate and requested by petitioner. A logical extension would then be to assess if legal fees are really damages!

The federal courts go to extreme lengths to warrant judicial immunity stating that a judicial officer must have independent thinking and free of harassment. This self-serving rational states that without immunity, judicial officers would than be intimidated to perform adequately.

Wouldn't every job or profession be able

to claim the same. Petitioner is a practicing dentist. He too would not like to be intimidated by peer review, sanctions by his dental board, or malpractice. Judges claim they are corrected by the appeal process. Dental patients can not only go to another dentist but can still sue for damages. The facts of society bear out that scrutiny of everyone's work makes that work performance better. Public opinion of the judicial officers is low and getting worse because the appeal process and disciplinary boards are not just ineffective but usually worthless. Judicial immunity was gladly brought to America from England's monarch. The judicial defendants use in their defense the case Stump v. Sparkman, 435 U.S. 349 (1977). In that case, a petition was signed by Judge Stump that required

immediate attention. The Mayercheck case showed no immediate harm or documentation evidence of any threat to the welfare of the child. (App. E&F) In the Stump case there was no later remedy as sterilization of a child took place that couldn't be reversed. The Mayercheck case has gone on for over 3 years with the state courts able to remedy at any time. By their refusal, shows the bad faith. The Stump decision for immunity was 5-3-1 back in 1977. By the federal courts not wanting to address immunity, is it not merely an attempt to protect judicial officers regardless of the crime and is it not self-serving?

Recently the Pennsylvania State Courts decided a similar case quickly. That only shows relief is possible so long as a father doesn't enforce his 1st

Amendment right to redress his gcvernment. By the way, the Pennsylvania Constitution guarantees that no citizen will have their rights abridged by a government agency, Art. 1 #26. A mother repeatedly filed false sex abuse allegations against the father and asked the court to suspend father's custody. The lower court denied the mother's petition, ordered her to pay $2,000.00 toward the father's counsel fees, exposed her motivation to always cry "wolf", and refused her expert witness. The Pennsylvania Superior Court affirmed in M.C. v. R.W., 580 A 2d. 1124 (1990). This case only started in 1989 while the Mayercheck case has gone on for over 3 years. Never has petitioner been charged with anything and in fact was ordered to pay Woods' attorney fees in the ex-parte

order terminating his parental rights. In Pulliam, the Court restrained a Magistrate and ordered attorney fees for her incarcerating defendants without a trial on the merits for incarcerable offenses. In the Mayercheck case, judicial officers, have "incarcerated" petitioner's parental rights, without a hearing on the merits, and without a legal reason.

E. **Exceptional circumstances warrant the intervention by this Court.**

In Stanley v. Illinois, 405 U.S. 645, 651-652 (1972) the Supreme Court recognized that the father's interest in retaining custody was at least cognizable and substantial and that it "undeniably warrants deference and, absent a powerful countervailing interest, protection". Joseph A. Mayercheck, had his parental rights involuntarily terminated in August 1988.

He has not seen his daughter since. To deny this appeal is a direct request for the United States Congress to repeal 42 U.S.C., #1983 and 1985 (3). Citizens have no protection against state court judges that act in error, bad faith, with malice or in conspiracy to violate federal constitutional and statutory laws that protect individual rights.

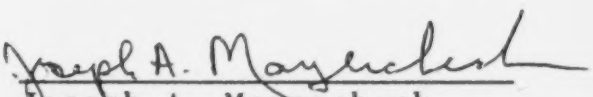
CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

January 1, 1991

Date



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-3353

JOSEPH A. MAYERCHECK, D.M.D.,
Appellant

v.

THE SUPREME COURT OF PENNSYLVANIA, THE HONORABLE W. TERRENCE O'BRIEN, THE HONORABLE R. STANTON WETTICK, The Court of Common Pleas of Allegheny County, Pennsylvania, THE HONORABLE LAWRENCE W. KAPLAN, and THE HONORABLE DAVID CASHMAN

On Appeal From the United States District Court for the Western District of Pennsylvania (D.C. Civil No. 90-00016)
District Judge: Honorable Gustave Diamond

Submitted Under Third Circuit Rule 12(6)
September 19, 1990

Before: BECKER, SCIRICA and NYGAARD, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Appendix A

Costs taxed against appellant.

BY THE COURT,

/s Becker
Circuit Judge

DATED: Oct. 29, 1990

ATTEST:

/s Sally Mrvos
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-3353

JAMES A. MAYERCHECK, DMD,
Appellant

v.

SUPREME COURT OF PENNSYLVANIA, THE HONORABLE W.TERRENCE O'BRIEN, THE HONORABLE R. STANTON WETTICK, THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA, THE HONORABLE LAWRENCE W. KAPLAN, and THE HONORABLE DAVID CASHMAN
(W.D. PA. Civ. No. 90-00016)

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

PRESENT: HIGGINBOTHAM, Chief Judge,
SLOVITER, BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA, COWEN,
NYGAARD, ALITO, Circuit Judges.

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular

Appendix B

active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

s/Becker
Circuit Judge

DATED : Nov 14 1990

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3024

AMANDA MAYERCHECK, by her father, next friend and natural guardian, JOSEPH MAYERCHECK,
and
JOSEPH MAYERCHECK,
Appellants,

vs.

HONORABLE DAVID CASHMAN, HONORABLE W. TERRENCE O'BRIEN HONORABLE LAWRENCE KAPLAN and SHARON SAUL, M.S.,
Appellees.

Appeal from the United Stated District Court for the Western District of Pennsylvania (D.C. Civil NO. 88-2532) District Judge: Honorable D. Brooks Smith

---

Submitted under Third Circuit Rule 12(6) May 16, 1989
Before: GIBBONS Chief Judge, MANSMANN and ALDISERT, Circuit Judges.
(Filed May 18 1989)

MEMORANDUM OPINION OF THE COURT

APPENDIX C

ALDISERT, Circuit Judge.

This appeal requires us to determine whether the district court erred in abstaining under the principle of federalism set forth in Younger v. Harris, 401 U.S. 37 (1971). Joseph Mayercheck has filed a complaint against several judges of the Court of Common Pleas of Allegheny County, a court-appointed psychologist and other parties. His complaint is a disagreement with the court's decision relating to custody of his minor child. The district court dismissed the complaint on the basis of abstention. Mayercheck has appealed and we now affirm.

Although Younger v. Harris concerned abstention from state criminal proceedings, in Penzoil Company v. Texaco Inc., U.S. (55 U.S.L.W. 4497) (1987), the court noted that the notion of comity "mandate" the application of Younger abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the state's interest in the proceedings are so important that the exercise of the federal judicial power would disregard the comity between the states and national government" 44 U.S.L,W. at 4460.

The Court has repeatedly recognized that the states have important interests in administering certain aspects of the judicial system. Thus, the abstention doctrine set forth in Younger has been applied in a variety of civil contexts in which important state interests are involved. See Moore v. Sims, 442 U.S. 415 (1979) (custody); Trainor v. Hernandez, 431, 434 (1977) (public assistance); Juidice v. Vail, 430 U.S. 327 (1977); (contempt); Huffman v. Pursue, 420 U.S. 592 (1975) (nuisance).

As the magistrate in these proceedings indicated, although the Common Pleas Court has entered a final order, it retains jurisdiction over the custody case and may modify the order at any time the circumstances warrant. Thus, the state proceedings are ongoing 23 Pa.C.S.A. Sec. 5310.

We are satisfied with the magistrate's summary of the nature of this case:

Child custody is an area which has historically been accepted as an important state interest. Accordingly, Pennsylvania has codified its law governing child custody at 23 Pa.C.S.A. Sec. 5301-5314. Among other things, this title of Pennsylvania statutory law provides for the adjudication of Pennsylvania Rules of Civil Procedure 1915.1 et seq. 42 Pa.C.S.A., set forth the

procedures to be followed in the adjudication of child custody claims...

These provisions make clear that the Court of Common Pleas is empowered to hear all claims arising out of matters pertaining to child custody including federal claims, and, in fact, Pennsylvania courts have routinely addressed claims of constitutional deprivation in connection with child custody matters. See Fanaman v. Cowgill, 526 A.2d 1226 (Pa.Super. 1987) (incarcerated father denied due process for failing to provide adequate notice of custody hearing); Bruzzi v. Bruzzi, 481 A.2d 648 (Pa.Super, 1984) (incarcerating a father without hearing for violating custody order in a denial of due process); In re: Long, 459 A.2d 403 (Pa.Super. 1983) (foreclosing parents from cross-examining witnesses at custody hearing violates due process).

Moreover, orders of the Family Division, such as the one which plaintiff complains of, are appealable to the Superior Court of Pennsylvania. Mahoney v. Mahoney, 512 A.2d 694 (Pa.Super. 1986) ... (T)he Pennsylvania law and procedures for adjudication in this area provide a more than adequate forum for the protection of plaintiff's rights both state and federal. Accordingly, because plaintiff's federal claims could be adjudicated and her (sic) constitutional rights protected in the courts of Pennsylvania, abstention is clearly appropriate under these circumstances.

Magistrate's Report and Recommendation, Appendix pp. 40-42.

We are satisfied that the court did not err in ordering abstention here.

This too must be said.

With respect to Judges Cashman, O'Brien and Kaplan, it is well established that judges are immune from liability for damages for judicial matters within the judges' subject matter jurisdiction. This immunity applies regardless of whether the judge's action is in error, performed with malice or is in excess of the judge's authority, Stump v. Sparkman, 435 U.S. 349 (1978), or is performed as a result of a conspiracy with others, Dennis v. Sparks, 449 U.S. 24 (1980).

The allegations in the complaint with respect to the judges concern judicial acts taking as judges of the Family Division, the Pennsylvania Court of Common Pleas in a subject over which the

judges had jurisdiction. See 42 Pa.C.S.A. Sec. 931, Pennsylvania Constitution, Art. V.

We have carefully considered all of the contentions presented by the appellant.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s R. Aldisert
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. MAYERCHECK,DMD, Plaintiff,	)	
	)	CIVIL
v.	)	ACTION NO.
	)	90-16
SUPREME COURT OF PENNSYLVANIA, THE HONORABLE W.TERRENCE O'BRIEN) THE HONORABLE R. STANTON WETTICK) THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA, and THE HONORABLE DAVID CASHMAN, Defendants.	)	

O P I N I O N

DIAMOND, J.

Plaintiff commenced this action on January 3, 1990. This custody disputes with his former wife regarding their daughter, Amanda Mayercheck.[1] In Mayercheck v. O'Brien, et all, Civil Action No. 88-2532, Judge D. Brooks Smith dismissed plaintiff's suit on abstention grounds, following the report and recommendation of United States

1. This opinion assumes familiarity with the facts of this case as developed at the Jan. 17, 1990, hearing and oral argument on the Plaintiff's motion for a temporary restraining order and on defendant's motion to dismiss.

Magistrate Lancaster. Pursuant to a memorandum opinion dated May 18, 1990, the United States Court of Appeals for the Third Circuit, by Judge Aldisert, affirmed the district court. Mayercheck v. Cashman, et al, No. 87-3024 (3d Cir. 1989). Similarly, in Mayercheck v. Saul, et al, No. 89-1372, Judge Smith, adopting the report and recommendation of Magistrates Lancaster, dismissed plaintiff's suit on abstention grounds.

Plaintiffs sough a temporary restraining order in this court on January 5, 1990. Noting that plaintiff had not effected proper service of the motion for a temporary restraining order and had not provided a justification for failing to do so pursuant to Fed..R.Civ. P. 65, we refused to issue the order and scheduled the hearing and oral argument on the motion for January 17, 1990. At that hearing, we also considered the

defendant's motion to dismiss plaintiff's complaint on, among other grounds, the basis of abstention. [2]

After hearing and oral argument, we denied the motion for a temporary restraining order by order of January 18, 1990. Pursuant to that order the parties were to file a stipulation regarding the proceedings before the Court of Common Pleas of Allegheny County by January 23, 1990. We also ordered defendants to submit a brief in support of their motion to dismiss by January 23, 1990, and plaintiff to submit a response by January 26, 1990.

We received defendants' brief in a timely manner. Defendants also submitted an an affidavit with exhibits in lieu of a

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2. The defendants also filed a motion to transfer this case to Judge Smith as related to Civil Action No.s 88-2532 and 89-1372. We indicated to counsel that we would deny the motion to transfer in the interest of judicial economy as we were already familiar with the facts and issues in the instant suit.

stipulation in a timely manner.[3] Plaintiff, however, failed to follow our order. He filed nothing in response to our order requiring a stipulation and filed no brief in response to the defendants' motion to dismiss.[4] Having reviewed the brief in support of the motion to dismiss, and the supporting affidavit and exhibits, we are convinced that our tentative conclusion expressed at the hearing on January 17, 1990 that abstention is appropriate and correct. Furthermore, we are convinced that the defendants are immune from damages liability.

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3. Because of time constraint, counsel for defendants, Ms. Stark, submitted the affidavit and exhibits. Ms. Stark represented to the court that plaintiff's counsel Mr. Jackson, did not contact her regarding submission of a written motion for extension of time to the court after we had previously granted and oral two-day extension for the submission of the stipulation. Thus, the deadline for submission of the stipulation came and Mr. Jackson and Ms. Stark had not yet had the opportunity to confer regarding the stipulation.

4. Plaintiff did, however, file yet another

lawsuit in this court regarding these matters at Civil Action No. 90-557.

Plaintiff and the defendants are no doubt aware of the relevant abstention principles from the three opinions issued in the two previous cases plaintiff has filed in this court regarding his custody disputed in the Court of Common Pleas. The United Stafes Supreme Court in Pennzoil Co. v. Texaco, Inc. 481 U.S. 1 (1987), held that federal courts must abstain under the principle of federalism set forth in Younger v. Harris, 401 U.S. 37 (1971), from entertaining actions for injunctive or declaratory relief against state courts where significant state interests may be harmed by our intrusion into the state judicial system. This abstention doctrine, which initially applied to state criminal prosecutions, had later been held by the Supreme Court to apply to a variety of